

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

<i>In the Matter of</i>)	
)	CG Docket No. 02-278
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
)	
Petitions for Declaratory Ruling and Retroactive)	
Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding)	
the Commission's Opt-Out Notice Requirement)	
for Faxes Sent with the Recipient's Prior Express)	
Permission)	

To: Office of the Secretary

Attention: The Commission
Consumer and Governmental Affairs Bureau

APPLICATION FOR REVIEW

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December 2, 2016

Summary of the Argument

On November 2, 2016, the Bureau granted North American Bancard, LLC's ("NAB") waiver petition. West Loop Chiropractic & Sports Injury Center, Ltd. and West Loop Health & Sports Performance Center, LLC (collectively, "West Loop"), have been treated unfairly when the Bureau did not consider important factual evidence of additional alleged TCPA violations by NAB in order to rebut the presumption of "confusion or misplaced confidence" claimed by NAB. West Loop provided evidence of additional alleged TCPA violations against NAB in their Comment, which were not mentioned or considered in the *November 2nd Order*. West Loop also was aggrieved when the Bureau erroneously did not consider any evidence to determine whether NAB obtained consent. West Loop provided an affidavit with their Comment demonstrating that they did not consent to receive faxes from NAB.

West Loop was also harmed when the Bureau granted NAB's untimely filed waiver petition. Notably, the junk faxes that are the subject of West Loop's complaint, which was attached to NAB's waiver petition, were sent well after April 30, 2015, demonstrating that NAB had notice of the opt out notice requirements and chose not to comply. In granting NAB's waiver petition, the Bureau again did not consider or acknowledge the important, material fact that NAB sent post-April 30, 2015 non-compliant junk faxes. West Loop is also aggrieved by the *November 2nd Order* because of the procedurally inappropriate standard used to determine whether a waiver is permitted instead of a true factual determination of actual confusion on behalf of each petitioner. It is unfair to apply what amounts to an irrebuttable presumption of confusion.

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APPLICATION FOR REVIEW

West Loop Chiropractic & Sports Injury Center, Ltd. and West Loop Health & Sports Performance Center, LLC (collectively, "West Loop"), by and through their attorneys, and pursuant to Section 1.115 of the Commission's rules, seek review of the November 2, 2016 Order, DA 16-1242 ("*November 2nd Order*") of the Chief, Consumer and Governmental Affairs Bureau. The November 2nd Order grants a retroactive waiver to North American Bancard, LLC ("NAB") of the Commission's regulation requiring an opt out notice on fax advertisements sent with the prior express permission of recipient prior to April 30, 2015. The Commission should vacate the *November 2nd Order* as to NAB.

Questions Presented

Pursuant to Section 1.115(b), West Loop Chiropractic & Sports Injury Center, Ltd. and West Loop Health & Sports Performance Center, LLC presents the following questions for review:

1. Whether the Bureau erred in finding North American Bancard, LLC's petition timely when it was filed on August 16, 2016, over 1 year and 4 months after the April 30, 2015 deadline set forth in the *2014 Anda Commission Order*?
2. Whether the Bureau erred in applying a standard of review, the presumption of "confusion or misplaced confidence", in granting NAB a waiver?
3. Whether the Bureau erred in finding the presumption of "confusion or misplaced confidence" was not rebutted by factual evidence of additional alleged TCPA violations by North American Bancard, LLC?
4. Whether it is erroneous for the Bureau to solely consider NAB's unsubstantiated, rote statement of "confusion or misplaced confidence" as opposed to implementing a fair process which allows a determination of all relevant facts?

Factual and Procedural Background

On June 3, 2016, the West Loop plaintiffs filed a putative class action complaint against NAB in the United States District Court for the Northern District of Illinois, alleging violations of the TCPA. The West Loop plaintiffs allege that they were sent 2 unsolicited advertising faxes on April 18, 2016 and April 26, 2016 from NAB. West Loop alleges that they did not have a prior relationship with NAB and had not authorized the sending of faxes to them. West Loop also alleges that the junk faxes NAB sent to them do not contain an opt out notice that complies with 47 U.S.C. § 227.

In responses to written discovery, NAB contends that it did not send any faxes nor authorize the sending of any faxes. NAB also asserts an affirmative defense of prior express

permission and EBR. NAB's written discovery responses claim that another entity, Merchant Payment Processing, Inc. ("MPP") obtained consent. It didn't.

On or about August 16, 2016, NAB filed a petition seeking a retroactive waiver from 47 C.F.R. § 64.1200(a)(4)(iv), the regulation requiring an opt out notice on faxes sent with "prior express invitation or permission". West Loop filed a Comment opposing the NAB petition arguing that NAB did not provide any evidence of consent, that there was no factual basis for its claimed reliance on the Junk Fax Order's footnote, that NAB's petition was untimely, and that it was contrary to public policy to allow a serial TCPA violator, like NAB, to continue to violate the law willfully.

In its petition for waiver, NAB sought a limited waiver with respect to any solicited faxes it sent prior to April 30, 2015. NAB stated that it "did not understand and was reasonably uncertain whether the opt-out requirements applied to solicited facsimiles." Yet, NAB never articulates any factual basis for its claimed reliance and instead copied language from the *2014 Andia Commission Order*, 29 FCC Rcd at 14011, para. 29.

Notably, NAB is not similarly situated to other petitioners. NAB has previously been sued for sending junk faxes, *Zoes v. North American Bancard, Inc.*, 03 CH 17879 (Cir. Ct. Cook Cty., Ill.), as well as for other TCPA violations. See *Fountain v. North American Bancard, LLC*, 4:12-cv-00459 RAS-DDB (E.D. Tex.) (Alleged violation of the TCPA); *Mey v. North American Bancard, LLC*, 2:14-cv-11331-DPH-MJH (E.D. Mich.) (Alleged TCPA violation for telemarketing call to cell phone); *Mey v. Patriot Payment Group, LLC and North American Bancard, LLC*, 5:15-cv-00027-JPB-JES (N.D. W.Va.) (Alleged TCPA violation for telemarketing calls to cell phone); *Mey v. North American Bancard, LLC*, 5:14-cv-00022-FPS

(N.D. W.Va.) (Alleged TCPA violation for telemarketing calls to cell phone). NAB was clearly familiar with the statute and regulations, and chose not to comply.

NAB should have been aware that the FCC was permitting parties to petition for over a year and 4 months on this issue when it allowed the April 30, 2015 deadline for waiver requests to expire. NAB has sat idly by until it was served with another lawsuit and then sought to attempt to limit its liability by requesting a waiver. NAB does not explain its inaction. It is obviously a tactical ploy to obstruct the litigation. “In the *2014 Anda Commission Order*, the Commission did not require that faxers currently face lawsuits or potential liability to qualify for the waiver.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 & 05-338, DA 15-976, 2015 WL 5120879, at ¶ 19 (Aug. 28, 2015).

In the *November 2nd Order*, the Bureau granted NAB’s (and 21 other petitioner’s) requests for a retroactive waiver because “they have demonstrated that they are similarly situated to the parties granted relief by the Commission in the *2014 Anda Commission Order*.” *November 2nd Order*, ¶ 11. The *November 2nd Order* “decline[d] to reject petitions solely on the basis that they were filed after April 30, 2015.” *Id.* at ¶ 18. The *November 2nd Order* further provides “Any non-compliant faxes (i.e., faxes that do not include the required opt-out information) sent after that date are subject to Commission enforcement and TCPA liability.” *Id.* at ¶ 18.

In granting the waiver petition, the Bureau failed to address West Loop’s argument that the fact that other TCPA cases were filed against NAB rebuts the presumption of confusion or

misplaced confidence and makes NAB not “similarly situated” to other petitioners. Granting waiver petitions to serial TCPA defendants like NAB is against the public interest.

I. THE BUREAU RELIED ON ERRONEOUS MATERIAL FACTS.

A. NAB’s Petition Was Not Timely Filed.

NAB filed its petition well after April 30, 2015, the six-month date referenced in the *2014 Anda Commission Order*. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 & 05-338, FCC 14-164, 29 FCC Rcd 13998 (Oct. 30, 2014) (“*2014 Anda Commission Order*”). The Commission “expect[ed]” that parties “make every effort” to file a waiver petition by April 30, 2015. *2014 Anda Commission Order*, ¶¶ 2, 30. NAB filed its petition on or about August 16, 2016, which is over a year and 4 months after the deadline set forth in the *2014 Anda Commission Order*. NAB did not articulate the efforts in made in seeking a waiver because NAB did not make any effort in getting a petition on file until it had been sued by West Loop. The Bureau answers this argument stating, “The only deadline imposed by the *2014 Anda Commission Order* is a deadline for compliance with the regulation.” *November 2nd Order*, ¶ 18, n 70. However, the fact that no deadline would be set to seek a waiver petition gives uncertainty and is prejudicial to all parties and cannot be what the Commission intended.

The Commission stated “we do not waive the rule indefinitely, consumers will not, as a result of our action, be deprived of the rule’s value.” *2014 Anda Commission Order*, ¶ 28. Clearly, there was an intent to have waiver petitions on file by April 30, 2015 when the Commission specifically directed “the Consumer and Governmental Affairs Bureau (Bureau) to

conduct outreach to inform senders of the opt-out notice requirement.” *2014 Anda Commission Order*, ¶ 2.

In fact, West Loop, along with at least 7 other Commenters identified in the *November 2nd Order* raised this timeliness argument demonstrating that others agree that there is a timing requirement for filing a waiver petition set forth in the *2014 Anda Commission Order*. *November 2nd Order*, ¶ 15, n. 68. Moreover, the phrase, “make every effort” employed by the Commission implies that the petitioner takes some action by April 30, 2015. On this record, NAB took no action to obtain a waiver by April 30, 2015, and for this reason, the *November 2nd Order* should be vacated.

B. NAB Sent Junk Faxes To West Loop After April 30, 2015.

The *2014 Anda Commission Order* also imposed a deadline of April 30, 2015 for compliance with the regulation. In granting the waivers, the Commission recognized an interest in protecting parties from substantial damages if they violated the opt out requirement due to confusion or misplaced confidence, and “an offsetting public interest to consumers through private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads.” *2014 Anda Commission Order*, ¶ 27.

While NAB’s petition sought a waiver of faxes sent prior to April 30, 2015, the reason NAB sought a waiver was because it has been sued for conduct allegedly occurring **after April 30, 2015**. The faxes sent to the West Loop plaintiffs were sent in April 2016 and do not contain **any** opt out notice. Subsequent to being served with the complaint in the West Loop plaintiffs’ case, NAB has continued to send out junk faxes without any opt out notice. (Exhibit A) The Bureau did not consider these material facts even though each waiver request is supposed to be

“adjudicated on a case-by-case basis”. *Id.* at ¶ 30, n. 102. Granting NAB’s waiver petition rewards its noncompliance with the TCPA and the regulations and is unfair to West Loop because it has the practical effect of a finding of no liability on faxes sent prior to April 30, 2015 and reduces the size of any putative class alleged by West Loop. For these reasons, the *November 2nd Order* should be vacated as to NAB.

II. THE PRESUMPTION OF “CONFUSION OR MISPLACED CONFIDENCE” WAS REBUTTED BY EVIDENCE OF OTHER ALLEGED TCPA VIOLATIONS.

A. NAB Is Not Similarly Situated To Other Petitioners.

The Bureau found that NAB was similarly situated to the petitioners who received a waiver in the *2014 Anda Commission Order*. *November 2nd Order*, ¶ 11. However, as set forth above, NAB has previously been a defendant in a junk fax TCPA case, and has been sued for other alleged TCPA violations for telemarketing calls to cell phones. Despite citations of these cases in West Loop’s Comment, the Bureau erroneously stated “there is no evidence in the record demonstrating that petitioners understood they were required to comply but failed to do so.” *November 2nd Order*, ¶ 17. NAB was clearly on notice of the statute and regulations, and chose not to comply. “[S]imple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.” *2014 Anda Commission Order*, ¶ 26. In this case, the balance was unjustly struck in favor of a serial TCPA violator and the interests of consumers, like West Loop, are ignored. This certainly is not the case where “confusion” resulted in “inadvertent violations”. *Id.* at ¶ 27. For these reasons, NAB is not similarly situated to other petitioners and the Commission should vacate the *November 2nd Order* as to NAB.

B. Bureau Erroneously Failed To Consider Facts Presented By West Loop.

The Commission stated that a waiver applies to “any situation where the fax sender had obtained the prior express invitation or permission of the recipient to receive the fax advertisement.” *2014 Anda Commission Order*, ¶ 30. NAB contends that a third party, MPP obtained consent from recipients of its junk faxes. It is unclear how NAB, a nonparty to those alleged communications, can claim prior express permission from fax recipients, let alone obtain a waiver on these grounds. NAB has also raised an affirmative defense of prior express permission, but has not demonstrated consent from any of the junk fax recipients.

West Loop submitted an affidavit with their Comment, which included the April 2016 junk faxes, testifying that they did not consent to receive faxes from NAB, and they did not have a prior relationship with NAB. The Bureau “decline[d] to conduct a factual analysis to determine whether petitioners actually obtained consent.”, leaving that question “for the triers of fact in the private litigation.” *November 2nd Order*, ¶ 16. The Bureau’s determination to not consider West Loop’s contradictory facts is unfair and erroneous.

The FCC has interpreted the “sender” as “the person or entity on whose behalf the advertisement is sent. In most instances, this will be the entity whose product or service is advertised or promoted in the message.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 and 05-338, Report and Third Order on Reconsideration, 21 FCC Rcd 3787, 3808 (April 6, 2006) (“Junk Fax Order”). Prior express permission to “receive facsimile advertisements from that company or organization.” is limited to the organization that requested

the fax number. *Id. See, Satterfied v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (defendant cannot claim the benefit of prior express consent given to an unaffiliated party).

The FCC has determined that “a sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient’s prior express invitation or permission.” *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 21 FCC Rcd at 3812. The FCC has consistently adhered to this position. *Virtual Auto Loans*, EB-09-TC-230, 2009 FCC LEXIS 4342 (March 9, 2009); *New York Security and Private Patrol, Inc.*, EB-09-TC-231, 2009 FCC LEXIS 4343 (March 9, 2009). NAB cannot demonstrate that it obtained prior express permission from any of the recipients, and therefore, should not be entitled to a waiver.

The sender of the faxes is the one entitled to raise affirmative defenses of consent or EBR. 21 FCC Rcd at 3807-08. Courts have placed the burden of proof on the sender of the faxes to demonstrate prior express permission. *Gutierrez v. Barclays Group, 10cv1012 DMS (BGS)*, 2011 WL 579238, at *2 (S.D. Cal. Feb. 9, 2011); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 WL 2224892, at *3-4 (N.D. Ill. May 27, 2008) (observing that issue of consent is an affirmative defense); *Hinman v. M & M Rental Center, Inc.*, 596 F.Supp.2d 1152 (N.D. Ill. 2009) (finding that consent did not exist with respect to the class because the TCPA allocates the burden of obtaining consent on the senders of unsolicited faxes, rather than requiring recipients to “opt out”). This is consistent with the general rule that the party claiming the benefit of an exception in a federal statute, and the party who logically would have evidence of consent or an established business relationship, has the burden of coming forward with at least some evidence of the applicability of these exceptions. *E.E.O.C. v. Chicago Club*, 86 F.3d 1423, 1429-30 (7th

Cir. 1996); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395, 2400 (2008) (“[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.”); *Irwin v. Mascott*, 96 F.Supp. 2d 968 (N.D. Cal. 1999).

While the *November 2nd Order* states “that the granting of a waiver does not confirm or deny that the petitioners had the prior express permission of the recipients to send the faxes.”, the practical effect of the order is a waiver of liability on faxes sent prior to April 30, 2015.

November 2nd Order, ¶ 17. It is procedurally improper to grant a waiver of liability that West Loop will have to challenge again in private litigation when the Bureau failed to employ a process whereby all facts are determined. This undermines the TCPA to the detriment of the consumer. Here, NAB has not shown it obtained prior express permission consistent with the statutory requirements and Commission Order and allowing a waiver under these circumstances is erroneous.

C. Unfair Standard Is Used to Grant Waiver Petitions.

The *2014 Anda Commission Order* stated that a footnote¹ in the *Junk Fax Order*, caused confusion regarding the applicability of whether an opt out notice² was required on faxes sent with prior express permission. *2014 Anda Commission Order*, ¶ 15.

¹ The footnote in *Junk Fax Order* provides: “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.” 21 FCC Rcd at 3810, n. 154.

² The *Junk Fax Order* adopted a rule which provides that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.” 47 C.F.R. § 64.1200(a)(4)(iv).

The *2014 Anda Commission Order*'s test for a waiver is the petitioner merely referencing the confusion between the footnote and the rule. Rote copying of the language from the *2014 Anda Commission Order*, cannot alone provide a "record" of evidence of confusion. NAB's petition is not supported by any affidavits, nor is it signed by any representative on behalf of NAB. It only attaches a copy of West Loop's complaint.

While a petitioner only needs to state that it was "confused" to obtain a waiver, absent any evidentiary support or actual determination of confusion, the respondent consumer has a disproportionate burden to overcome to successfully challenge the waiver request. The Commission has stated that a "judicial finding" could rebut the presumption of confusion, but evidence of serial violations, including violations after April 30, 2015, and violations after a lawsuit has been filed are insufficient. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 & 05-338, DA 15-976, at ¶ 18 (Aug. 28, 2015). This is unfair and prejudicial. In most instances, waiver petitions are filed at the beginning of litigation where there have been no substantive rulings or a trial.

The West Loop plaintiffs provided evidence to rebut the presumption of confusion by citation to other recent TCPA litigation in which NAB was named as a defendant but it was not even acknowledged in the *November 2nd Order*.

Consumers opposing petitions for waivers are at an unfair disadvantage in successfully challenging a petition. Hundreds of waiver petitions have been granted since the *2014 Anda Commission Order*, while only a few have been denied (approximately 6%), mostly on grounds of ignorance of the law. *In the Matter of Rules and Regulations Implementing the Telephone*

Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278 and 05-338, 2015 WL 5120879 (Aug. 28, 2015) (All 117 waiver petitions were granted); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 and 05-338, DA 15-1402 (Dec. 9, 2015) (Five of 11 waiver petitions were granted; five petitions denied where petitioners admit to be unaware of the opt out notice requirement and one petition denied where faxes sent to those with an EBR); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 and 05-338, DA 16-1242 (Nov. 2, 2016) (Twenty-two out of 26 waiver petitions were granted; three petitions were denied where petitioners admit to being unaware of the opt out notice requirement and one petition granted and denied in part where petitioner requested a waiver for faxes sent without opt out notices after April 30, 2015). Consumers cannot successfully challenge these petitions unless petitioners claim they are ignorant of the law or seek waivers for conduct after April 30, 2015. Consumers challenging the petitions have to present evidence at a higher and much more difficult standard than petitioners, who only have to make an unsubstantiated claim of general “confusion.” This double standard favors the violators of the statute and leaves the consumers for whom the statute was enacted to protect vulnerable. For these reasons, granting NAB a waiver is against public policy and the *November 2nd Order* should be vacated.

III. CONCLUSION.

For the reasons stated above, the Commission should vacate the waiver granted to NAB on November 2, 2016.

Respectfully submitted,

/s/ Daniel A. Edelman
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CERTIFICATE OF SERVICE

I, Daniel A. Edelman, hereby certify that copies of the foregoing “Application for Review” were sent on December 2, 2016 via U.S. Mail and email to the following:

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EXHIBIT A

FAX**North American BANCARD
Merchant Services**

Tel: 888-446-6532 Fax: 888-262-5167 & 888-446-6532

| Wells Fargo Tower | 2030 Main Street, Ste 1300, Irvine, CA 92614 |

TO: Gabby / Inspe Association	FROM: Evelyn Thompson, Account Manager
Fax: 3128991283	DATE: 8/4/16
RE: Your Merchant Account	PAGES: 5



URGENT



FOR REVIEW



PLEASE REPLY

We called your office earlier regarding **LOWERING your merchant rate considerably for Visa/MasterCard/Discover and Amex** (this will also include the **FREE** EMV replacement to avoid any download and terminal memory issues). Please see attached North American BANCARD Merchant Services agreement.

- Next Day Deposit,*
- NO cost to start this new program,
- NO paper statement fee,
- NO downtime as we handle the transfer for you at no cost to you.

Limited time offer!**Takes 5 minutes to complete:**

- ☒ page 1 of application: **Initial** & **Complete** where indicated by the arrows
 - **TAX ID &**
 - **OWNERSHIP** section
- ☒ **SIGN at the bottom of all** pages where indicated by the arrows,
- ☒ Include **Voided Check** for your deposits to start SAVING.
- ☒ **FAX to 888-262-5167 or try 888-446-6532** for a quick approval.

I want to personally thank you for your business. I wish you continued success and look forward to serving you in the years to come!

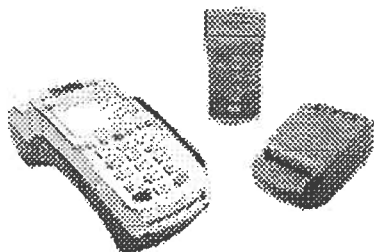
* Certain conditions may apply.

To be REMOVED from our offer to LOWER your merchant cost, write **REMOVE at the TOP** and fax back to (888) 519-4214 or Call 888-446-6532. Failure to comply with request within 30 days is unlawful.

FREE TERMINAL PLACEMENT AGREEMENT

NorthAmerican
BANCARD

FREE Verifone Vx520 Terminal or Vx520 w/ CR1000i Check Imager



- EMV-ready, PCI PED approved, advanced security including SSL
- Integrated NFC capabilities and expandable memory exceeding 500MB
- Superior performance for faster transaction processing
- Ethernet connection for lightning-fast transactions
- Multiple payment and value-added applications
- Lower cost, higher performance
- Small size keeps countertops clutter free

FREE Verifone Vx520 Terminal or Vx520 w/ CR1000i Check Imager

This Agreement is a contract between the Merchant named below and North American Bancard, Inc. (NAB). NOW THEREFORE, North American Bancard (NAB) and the Party (Merchant) agree as follows:

- I. Merchant agrees that the Equipment is the property of NAB, is being licensed to Merchant, and must be returned in good and working condition within ten (10) days of the termination or expiration of the Merchant Account with NAB. If the Equipment is not returned within ten (10) days, Merchant agrees to pay the equipment value (Vx520 = \$895, Vx520 Combo with check imager = \$1345, Pinpad \$100). Merchant authorizes NAB to ACH my account for said fees according to program. In addition, Merchant agrees to be responsible for any damage to the Equipment as a result of misuse or negligence. NAB reserves the right to replace the above models with comparable models and to add or discontinue models.
- II. Merchant agrees to indemnify and hold NAB harmless from and against any and all liabilities, losses, claims, damages, disputes, offsets, claims or counterclaims of any kind in any way related to the use (or misuse) of the Equipment. Merchant understands that NAB agrees to free overnight delivery of replacement equipment, fully programmed and ready to use, up to but not exceeding twice the first year, and that each additional incident will incur a fee of \$99.

Merchant has accepted the following equipment (the "Equipment") by checking one box below:

Verifone Vx 520 Terminal (equipment value of \$895)

Select Connection Type:

Dial Up Connection
IP Connection (Cable/DSL)

ISP Provider

ISP Phone Number

Except as herein otherwise expressly provided, the Merchant Agreement, as heretofore amended, shall remain in full force and effect.

Merchant's Authorized Signer:

North American Bancard:

Owner's or Officer's Signature

Date

SIGN HERE

Account Executive Signature

Date

INDIVIDUAL GUARANTY (NO TITLES) I/We hereby guarantee to NAB, their successors and assigns, the full, prompt and complete performance of Merchant and all of Merchant's obligations under this Agreement, including, but not limited to, all monetary obligations arising out of Merchant's performance or nonperformance under this Agreement, whether arising before or after termination of this Agreement. The undersigned, by signing below, agrees to be bound by the Agreement and this Guaranty.

Personal Guarantor Printed Name

Date

Personal Guarantor Signature

Date

BANK DISCLOSURE

Member Bank Information
The Bancorp Bank ("Bank")
409 SilverSide Road, Ste. 105
Wilmington, DE 19809

Agent Information
North American Bancard, LLC
250 Stephenson HWY
Troy, MI 48083
T. 888-446-6532

Important Bank Responsibilities

1. Bank is the only entity approved to extend acceptance of VISA products directly to a Merchant.
2. Bank must be a principal to the Merchant Agreement.
3. Bank is responsible for educating Merchants on pertinent VISA Operating Regulations or such pertinent rules and regulation of MasterCard International with which merchants must comply. Merchant acknowledges it has read and understood, or seek clarification from Agent or the Bank, all such rules and regulations before submitting a transaction for processing by Agent and Bank.
4. Bank is responsible for and must provide settlement funds to the Merchant.
5. Bank is responsible for all funds held in reserve that are derived from settlement.

Merchant Information

Merchant Name: _____

Merchant Address: _____

Merchant Phone: _____

Important Merchant Responsibilities

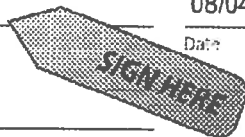
1. Ensure compliance with cardholder data security and storage requirements.
2. Maintain fraud and chargebacks below thresholds.
3. Review and understand the terms of the Merchant Agreement.
4. Comply with VISA, MasterCard, And American Express and Discover Operating Regulations.
5. You may download Visa Regulations from Visa's website at:
<https://www.visa.com/us/support/small-business/regulations-merchant>
6. You may download MasterCard Regulations from MasterCard's website at:
<http://www.mastercard.com/us/merchant/merchant-support/index.html>
7. You may download the American Express Merchant Operating Guide from American Express' website at:
<https://www.americanexpress.com/merchant/merchantguide>
8. You may download additional merchant information from Discover Network's website at:
<https://www.discovernetwork.com/merchant/index.html>

The responsibilities listed above do not supersede terms of the Merchant Agreement and are provided to ensure the Merchant understands some important obligations of each party and that the VISA Member – Bank – is the ultimate authority should the Merchant have any problems.

Merchant's Signature

08/04/16

Date



Merchant's Printed Name & Title

PRICING SCHEDULE☒ Retail ☐ Moto/Internet☒ Interchange Plus ☐ TieredInterchange, dues, & assessments + 95 bpsQualified discount rate: 0.95 %Transaction Fee: \$ 0.10Qualified discount rate (check card) 0.10 %

For details regarding mid-qualified and non-qualified surcharges, please see page 3 section 1.14 of the terms and conditions. For purposes of this agreement the mid-qualified surcharge* is 0 % (\$0 per \$100.00) + \$0. For purposes of this agreement the non-qualified surcharge is 0 % (\$0 per \$100.00) + \$0. Card association assessments will be passed through.

*mid-qualified surcharge only applicable to retail tiered merchants

CHUCK FEES

Dial pay transaction:	\$	Free tablet printer (monthly):	\$	Monthly minimum discount:	\$ <u>25.00</u>
I & I draft capture transaction:	\$ <u>0.25</u>	Free tablet printer/cash drawer (monthly):	\$	Monthly basic service:	\$ <u>5.00</u>
Address verification:	\$ <u>0.10</u>	Wireless transaction:	\$	Chargeback:	\$35.00
Batch header:	\$ <u>0.35</u>	Wireless monthly network access:	\$	Retrieval:	\$15.00
Interchange fee pass-through:		Wireless activation:	\$	Account setup:	\$
Credit:	\$ <u>1.10</u>	Debit transaction:	\$	Annual:	\$
Check Card:	\$ <u>2.22</u>	Debit monthly gateway:	\$	Voice authorization:	\$ <u>1.00</u>
Phone Swipe (PS) monthly gateway:	\$	EBT transaction:	\$	Annual PCI compliance:	\$ <u>79.00</u>
Phone Swipe add'l unit monthly gateway:	\$	Internet monthly gateway:	\$	NSF Fee:	\$ <u>25.00</u>
Phone Swipe transaction:	\$	Internet transaction:	\$	Paper Statement Fee:	\$

MasterCard Network Access: \$ 0.0208American Express Network Access: \$ 0.15%Visa Network Access: \$ 0.0218Discover/PayPal Network Access: \$ 0.0185

I understand and acknowledge that I will be automatically enrolled in a 60-day free trial of the My Biz Perks Program. At the end of the trial, I understand that my account will be charged a monthly membership fee of \$ 11.95, and I may opt out at any time by visiting www.mybizperks.com.

CERTIFICATION & AGREEMENT

Merchant acknowledges that you have accessed our Merchant Processing Agreement ("Agreement") at www.mymerchantsportal.com/agreement. By signing below, Merchant agrees to all terms and conditions contained therein. From time to time, the Agreement may be updated. When this occurs, Agent will notify Merchant electronically (or by delivery method selected by Merchant at time of disclosure) when such updates have been made. Merchant acknowledges that continued use of Agent Merchant services after the update signifies Merchant Acceptance of updated Agreement. The undersigned is duly authorized to sign on behalf of the Merchant and to bind the Merchant to the terms and conditions set forth in this Merchant Application ("Application") and previously referenced Agreement, and certifies that all information provided in association with this Application is true, correct and complete. By signing below on behalf of Merchant, you authorize Member/Bank and/or Agent to order a consumer credit report on you and/or Merchant, as well as subsequent consumer credit reports, which may be required or used in conjunction with the maintenance, updating, renewal or extension of the services provided hereunder, or in conjunction with reviewing, taking collection action on, or other legitimate purposes associated with the Merchant account. A Merchant's submission of a transaction to Agent shall be deemed to signify Merchant's acceptance of the Agreement, including the terms and conditions herein.

Merchant: By _____
(Merchant Principal or Corporate Officer Signature)Merchant: By _____
(Merchant Principal or Corporate Officer Signature)

(Print Name)

(Print Name)

Date: 08/04/16

Date: _____

PERSONAL GUARANTEE

In consideration of Agents and Bank's acceptance of this Agreement, the undersigned Guarantor (jointly and severally if more than one) unconditionally guarantees the performance of all obligations of Merchant to Agent and Bank under the Agreement, and payment of all sums due hereunder, and in the event of default, hereby waives notice of default and agrees to indemnify Agent and Bank for all funds due from Merchant pursuant to the terms of the Agreement. Guarantor waives any and all rights of subrogation, reimbursement or indemnity derived from Merchant, and further waives any and all rights or defenses arising by reason of any modification or change in the terms of the Agreement whatsoever, including, without limitation, the renewal, extension, acceleration, or other change in the time any payment or other performance hereunder is due, and/or any change in any interest or discount rate or fee hereunder. Guarantor confirms that Guarantor, collectively or individually, is a party to the Agreement and, unconditionally and specifically authorizes Agent and Bank, or its authorized agent, to debit any overdue fees, costs, chargebacks, fines, fees, penalties, expenses or obligations under the Agreement and/or any contractual relationship with Agent and Bank from any personal checking or other account owned or controlled by Guarantor, and further to report any default hereunder on Guarantor's personal Credit Bureau Report. Guarantor agrees to pay all costs and expenses of whatever nature, including attorney's fees and other legal expenses, incurred by or on behalf of Bank in connection with the enforcement of this Guaranty.

Merchant: By _____
(Guarantor Signature)Merchant: By _____
(Guarantor Signature)

(Print Name)

(Print Name)

Date: 08/04/16

Date: _____

